

February 5, 2008

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: FOIA Group, Inc.

Date of Filing: December 21, 2007

Case Number: TFA-0239

On December 21, 2007, FOIA Group, Inc. (FG) filed an appeal from a determination issued to it on November 29, 2007, by the Department of Energy's (DOE) Office of Headquarters Procurement Services (HPS). In that determination, HPS responded to a request for documents that FG submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. HPS identified a number of documents responsive to FG's request. Some of those documents were released in their entirety and, pursuant to Exemption 4 of the FOIA, others were released with some deletions. FG has challenged the withholding of information under Exemption 4. This appeal, if granted, would require HPS to release the withheld information to FG.

I. Background

FG requested copies of various documents relating to Task Order DE-AT01-03IM0002, including the contract, all modifications that changed the statement of work associated with this task order, all of the recent monthly and yearly reports related to this order and the last three award fee letters.¹ See November 29, 2007 Determination Letter from HPS to Jeff Stachewicz, FG.

HPS identified several documents responsive to FG's request. Of those documents, a number were released in their entirety. However, in the remaining documents, award fee scores, award fee amounts, award fee percentages, discount terms, labor rates, discount hours, dollar amounts of individual labor elements, subcontractor names, a key employee name, the ceiling price, the government site discount percentage and all references to a particular RSIS methodology used in the contract were withheld. The documents from which this information was withheld consist of three letters to RSIS from the DOE's Office of the Associate Chief Information Officer, dated

¹ Task Order DE-AT01-03IM0002 is a contract with RS Information Systems, Inc. (RSIS) to provide Information Systems Engineering services to the DOE.

April 5, 2005, December 22, 2006 and December 14, 2005 (Letters), along with a document entitled “U.S. Department of Energy Order for Supplies and Services” (contract).

HPS stated in its November 29, 2007 determination letter that the information was withheld pursuant to Exemption 4 of the FOIA. The determination letter explained that the withheld information was commercial or financial information related to RSIS business activities. Further, HPS explained that release of this information would give RSIS’ competitors an unfair advantage in future competitions for business by revealing the resources available to RSIS and by revealing RSIS strategy in constructing bids for future solicitations. HPS also asserted in the determination letter that Exemption 4 protects the interests of both the government and the submitters of voluntary information since it encourages submitters to voluntarily furnish useful and reliable commercial information to the government without fear of its disclosure.

FG challenged HPS’s withholding of information under Exemption 4. Letter from Jeff Stachewicz, FG, to OHA (December 21, 2007) (Appeal). FG argues that HPS’ reasons for denial are “illogical” under the Federal Acquisition Regulations (FAR) and the Competition in Contracting Act (CICA) and would defeat the underlying principles of those enactments. Specifically, FG argues that allowing RSIS to keep the withheld information to itself would in fact disadvantage its competitors in future competitions since RSIS, and not its competitors, would already know a winning combination of financial and other information. FG also challenges HPS’s characterization of RSIS’ information as being “voluntarily” submitted because, in negotiated procurement, submissions are in fact mandatory.

II. Analysis

Exemption 4 exempts from mandatory disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks*). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government’s ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

As discussed below, we find that almost all of the information withheld by HPS under Exemption 4 was properly withheld. FG’s argument concerning the general intent of the FAR and CICA do not supersede the FOIA statute and the associated case law that has developed interpreting the FOIA. The FAR itself expressly prohibits the release of an offeror’s “cost breakdown, profit, overhead rates, trade secrets . . . or other confidential business information be disclosed to any other offeror.” 48 C.F.R. § 15.503(b)(1)(v). Further, the CICA, 41 U.S.C. § 453, has no explicit provision requiring disclosure of winning offers. With regard to FG’s

argument as to whether the information was voluntarily submitted, as explained below, the fact that the withheld information was, in fact, required to be supplied to the government does not necessarily defeat Exemption 4 protection for such documents.

A. Information Withheld in the Contract

With regard to the information withheld in the contract, RSIS was required by DOE to submit the information in question. *See* Memorandum of Conversation between Craig Ashline, Frederick Dann, HPS and Richard Cronin, OHA (January 17, 2008). Accordingly, we find that the withheld information was “involuntarily submitted” and, in order for the application of Exemption 4 to be proper with regard to the information withheld in the contract, the *National Parks* test must be met.

Under *National Parks*, the first requirement is that the withheld information be “commercial or financial.”² The information submitted by RSIS in the contract, i.e. award fee percentages, discount terms, labor rates, discount hours, dollar amounts of individual labor elements, etc., clearly satisfies the definition of commercial or financial information.

The second requirement under the *National Parks* test is that the information be “obtained from a person.” It is well-established that “person” refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int’l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power CHPS*, 28 DOE ¶ 80,105 (July 31, 2000) (Case No. VFA-0591). All of the information withheld in the contract came from RSIS, a corporation.

Finally, in order to be exempt from disclosure under Exemption 4, the information must be “privileged” or “confidential.” This case concerns “confidential” information. Withheld information is confidential if its release would be likely to either (a) impair the government’s ability to obtain such information in the future or (b) cause substantial harm to the competitive position of submitters. *National Parks*, 498 F.2d at 770. In this case, because the contract for the project required that the information be submitted, it is unlikely that release of the information would impair DOE’s ability to obtain similar information in the future.

After reviewing the information in question, we conclude that virtually all of the information is confidential because release of the information could substantially harm RSIS’ competitive position. Disclosure of the information could give competitors insight into RSIS’ estimating processes, rate development methods, labor pricing, and procurement processes as well as its strategy regarding level of effort in various contract tasks. Disclosure of the key employee’s identity could allow competitors to try to hire the person away from RSIS as well as give competitors insight as to the skills RSIS deemed necessary to fulfill the contract. Disclosure of the award fee percentage and the government site discount agreed to by RSIS could enable other competitors to gain an unfair advantage in future government contract solicitations. In sum, almost all of this information could be used by competitors to undercut RSIS’ position to obtain future contracts. Nevertheless, the amount of the total ceiling price (in each of the Attachment J-

² Federal courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a “commercial interest” in them. *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (internal citation omitted).

8 tables) does not appear to be withholdable since release of this figure would reveal nothing as to the individual price elements that make up this sum. We will remand this matter to HPS to either release the total ceiling price for each of the Attachment J-8 tables or issue another determination letter to FG justifying the continued withholding of the information under the FOIA.

B. Information Withheld in the Letters

In the Letters, information such as DOE Contract Performance Evaluation Committee scores regarding RSIS' contract performance, numeric statistics related to RSIS' performance of the contract and the name and a description of an RSIS methodology used in the performance of the contract, were withheld under Exemption 4.

As an initial matter, we find that the withheld scores and statistics, such as number of hours worked, percentage change of hours, RSIS' DOE contract performance scores rating Quality, Timeliness and Cost and the amount of RSIS' award fee for a particular period originated with the DOE. Consequently, such information cannot be said to have been obtained from a "person" and thus cannot be protected under Exemption 4. Consequently we will remand this matter back to HPS. On remand, HPS may choose to release the RSIS scores and contract statistics in these letters or issue another determination letter withholding this information under another FOIA exemption.

With regard to the withheld name and description of the RSIS methodology used in its performance of the contract, we find that this information originated with RSIS and thus, the information for Exemption 4 purposes was obtained from a person. Because the contract was completed several years ago, HPS was not able to inform us whether the RSIS methodology was voluntarily submitted or was submitted as a requirement of the contract and thus involuntarily submitted. We need not make a finding on this issue because even under the stricter "involuntarily submitted" standard, this information would be properly withheld. Specifically, the description of the methodology is clearly commercial information. Release of the description of the methodology could significantly harm RSIS' competitive position by allowing competitors to obtain a vital tool RSIS used to fulfill the contract. Consequently, this information was properly withheld under Exemption 4.

It is not immediately apparent, however, that release of the name of the methodology could cause competitive harm to RSIS. The name itself only very generally alludes to the technique used in the methodology. On remand, HPS should either release the name of the methodology or, if it seeks to withhold the name under Exemption 4, determine whether the name of the RSIS methodology was either voluntarily or involuntarily submitted to HPS. If the name was voluntarily submitted, it may withhold the name under Exemption 4 if the name is such information that the submitter would not customarily release to the public. If the name was involuntarily submitted, and HPS seeks to withhold the name under Exemption 4, it should provide a more detailed explanation of the harm to RSIS that would result from release of the name, as required by *National Parks*. If HPS determines that Exemption 4 does not apply, it should release the name or justify withholding the name under another exemption in its new determination letter to the requester.

C. Discretionary Public Interest Disclosure of the Withheld Information

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1.

In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See, e.g., Chicago Power Group*, 23 DOE ¶ 80,125 at 80,560 (June 3, 1993) (Case No. LFA-0292). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4. *William E. Logan, Jr.*, 27 DOE ¶ 80,198 (April 9, 1999) (Case No. VFA-0484).

D. Segregability

The FOIA also requires that “any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (August 15, 1995) (Case No. VFA-0060). We find that HPS complied with the FOIA by releasing to FG virtually all portions of the documents not withholdable under Exemption 4, with the possible exception of the small portion of the documents to be reexamined on remand.

It Is Therefore Ordered That:

- (1) The Appeal filed on December 21, 2007, by FOIA Group, Inc., OHA Case No. TFA-0239, is hereby granted in part.
- (2) This matter is hereby remanded to the Office of Headquarters Procurement Services, which shall issue a new determination in accordance with the instructions set forth above.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 5, 2008